APPENDIX

SPECIFICATIONS OF ERROR

The following errors were assigned in the Circuit Court and are specifically brought forward and made a part of this petition:

1. No false statement vitiating the release was made by any representative of petitioner, and, therefore, the Circuit Court erred in not sustaining petitioner's assignments of error relating to the failure of the trial court to instruct a verdict for petitioner.

2. The Circuit Court erred in not sustaining petitioner's assignment of error reading as follows:

> "The verdict is unsupported by the evidence and is contrary to the great preponderance of the evidence, and plaintiff wholly failed to prove fraud by clear, unequivocal and convincing evidence as required, in that:
>
> "The representations made to plaintiff by Frank Massey were made as a layman, and not as a doctor; he was merely repeating an opinion expressed by Dr. Curb, who was plaintiff's physician and not defendant's; such representations were true, and not false, as shown by Dr. Curb's written statement to defendant; prior to the time Massey talked with plaintiff, Dr. Curb had told plaintiff that in his opinion his wife was not seriously hurt, or the substance of what he later stated to defendant in writing, and as a consequence plaintiff could not have relied upon the statements made by Massey; plaintiff accepted the Fifty Dollar ($50.00) check, which recited on its face that it was to cover his wife's injuries, and never cashed same for five days, during which time he knew that his wife had not fully recovered; in the meantime, plaintiff had many opportunities to inquire of Dr. Curb if he made the statements repeated to plaintiff

by Massey, and though such opportunity was afforded plaintiff he never made any inquiry of Dr. Curb if said statements were made and true, thereby estopping himself from claiming fraud in connection therewith."

3. The holding of the courts below, when substantially viewed, are in conflict with the holding of the Texas courts in the cases of **Lipscomb v. Houston Electric Company,** 149 S. W. (2d) 1042, **T. & N. O. Ry. v. Hawkins,** 112 S. W. (2d) 1107, **Panhandle Railway Company v. O'Neal,** 119 S. W. (2d) 1077, and **H. & T. C. Railway Company v. McCarty,** 94 Tex. 298, 60 S. W. 429, all holding that in order to avoid a release on the ground of fraud on the part of a physician, the releasor must show that the physician was employed by the releasee, since, otherwise, the latter would not be responsible for his representations and advice.

4. The Circuit Court erred in not sustaining petitioner's assignment of error reading as follows:

"The court erred in overruling and in refusing to give the following special instruction requested by the defendant:

"'If you find from the evidence that prior to the settlement Dr. Curb stated that Mrs. Buchanan's injuries were not as great as they really were, and you further find that plaintiff believed the statement of the doctor to be true, and relied thereon; nevertheless, if you further find that Dr. Curb was a physician of Mrs. Buchanan's own choice, and not the agent or employee of the defendant, the release and draft endorsement are binding on plaintiff and you should find for the defendant and so say by your verdict.'"

5. The trial court's charge being as follows:

"If the minds of the parties met and he understood at the time he signed it that his doctor had repre-

sented that his wife should be up and not in bed, and you further believe that this doctor was acting not merely for the plaintiff alone, but for either or both parties in this transaction, and you further find and believe that the statements made by the agent and conveyed to the plaintiff were not true, but were made to induce him to make the settlement, and that he acted upon them and that a man situated with the environments and conditions in which the plaintiff was situated and in which the defendant saw him situated, would have, in the exercise of ordinary prudence and judgment, acted as he acted, and relied upon the statements, then he may recover."

and the special charge requested by petitioner being as follows:

"If you find from the evidence that prior to the settlement Dr. Curb stated that Mrs. Buchanan's injuries were not as great as they really were, and you further find that plaintiff believed the statement of the doctor to be true, and relied thereon; nevertheless if you further find that Dr. Curb was a physician of Mrs. Buchanan's own choice, and was not the agent or employee of the defendant, the release and draft endorsement are binding on plaintiff and you should find for the defendant and so say by your verdict."

the Circuit Court erred in finding and holding that the special charge "was covered by the general charge."

6. The Circuit Court, in affirming the judgment of the trial court, based its action upon a misconstruction of the charge of the trial court; and such error in construction is vital to the disposition of the case.

7. The trial court having charged the jury as follows:

"If the minds of the parties met and he understood at the time he signed it that his doctor had represented that his wife should be up and not in bed, and you further believe that this doctor was acting not

merely for the plaintiff alone, but for either or both parties in this transaction, and you further find and believe that the statements made by the agent and conveyed to the plaintiff were not true, but were made to induce him to make the settlement, and that he acted upon them and that a man situated with the environments and conditions in which the plaintiff was situated, would have, in the exercise of ordinary prudence and judgment, acted as he acted, and relied upon the statements, then he may recover."

the Circuit Court erred in construing the charge as follows:

"In substance, the Judge charged the jury that if the minds of the parties met at the time Buchanan signed the release and he believed that the doctor was acting not merely for plaintiff alone but for both parties, he would be bound by the release, but if the jury should find that the statements made by the agents to plaintiff were not true but were made to induce him to make the settlement and he acted upon them, in the exercise of ordinary prudence and judgment, relying upon the statements, he could recover; that if plaintiff did not believe them, he could not recover."